

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 6, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2016AP921

Cir. Ct. No. 2014CV530

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

MENARD, INC.,

PLAINTIFF-RESPONDENT,

V.

ROCK RIVER POWER SPORTS, INC.,

**DEFENDANT-THIRD-PARTY
PLAINTIFF-APPELLANT,**

V.

DUCLOS PROPERTIES, LLC,

THIRD-PARTY DEFENDANT.

APPEAL from a judgment of the circuit court for Jefferson County:
JENNIFER L. WESTON, Judge. *Affirmed.*

Before Kloppenburg, P.J., Sherman and Blanchard, JJ.

¶1 PER CURIAM. Rock River Power Sports, Inc., appeals a money judgment in favor of Menard, Inc. We affirm.

¶2 The circuit court found that Rock River ordered construction materials from Menard, and that the materials were delivered and accepted, but that Rock River did not pay for them. The court awarded damages of approximately \$48,000.

¶3 Rock River argues that the circuit court erred in its finding as to what the legal relationship of the parties was regarding the sale of these materials. The circuit court found that the parties “entered into a contract ... with every individual purchase of materials.”

¶4 Rock River argues that, instead, the circuit court should have found that the parties had an oral contract in which Menard agreed to provide Rock River with a finished building for \$250,000. Rock River asks us to conclude that the court’s finding was clearly erroneous under WIS. STAT. § 805.17(2) (2015-16)¹ (after a trial to the court, its findings of fact shall not be set aside unless clearly erroneous).

¶5 We conclude that the circuit court’s finding was not clearly erroneous. The evidence that Rock River relies on to show a fixed-price oral contract is weak. Rock River relies most heavily on an e-mail message from a Menard service manager to Rock River. Rock River asserts that this message

¹ All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

“makes it pretty clear” that Menard promised to provide a building at a cost of \$250,000.

¶6 We disagree. The message, written after approximately \$244,000 in purchases, does not make it clear that such an agreement was made at some earlier time. In fact, one sentence appears to be directly in conflict with that idea: “We are doing everything we can to keep the cost down for you.” The implication of that sentence is that no fixed price existed, but instead the total amount that Rock River would spend was still to be determined by the costs of additional future purchases.

¶7 In the absence of a finding that a larger contract existed, it was also not clearly erroneous for the circuit court to find that there was instead a series of separate contracts for the purchase of materials. Rock River argues that this finding is not supported because there was no testimony about “an infinite number of offers, acceptances, and consideration.” However, we do not regard the absence of such evidence as significant. Most retail transactions occur without a formal offer and acceptance, but those elements are nonetheless present, and a contract is formed, by the customary practices of the situation and the parties’ conduct.

¶8 Rock River next argues that Menard failed to prove damages sufficiently. It argues that Menard did not prove any specific damages. It argues that the damage award was based on the chargeback amount that Rock River received from its credit card company when it disputed Menard charges. But, Rock River argues, Menard never proved what specific materials were part of that chargeback amount.

¶9 Rock River argues that we should review the finding of damages without deference because it was based on documentary evidence. Menard disagrees, but we need not decide that issue, because even if we were deciding this *de novo*, we would reach the same conclusion.

¶10 In an action for breach of contract where the buyer failed to pay for goods that were delivered, the most obvious measure of damages is the agreed-upon purchase price for the goods. We conclude that even if Rock River is correct that Menard did not present evidence about the identity or price of specific items that were included in the damages amount, there is nonetheless evidence of what the *aggregated* purchase price was for the materials that were delivered.

¶11 The evidence is the fact that Menard charged that amount to the credit card. The chargeback amount of approximately \$48,000 represented charges that were applied by Menard to Rock River's card, but which were not paid by Rock River. We conclude that it is reasonable to infer that the amounts charged to the card were the agreed-upon purchase prices for the materials delivered. Rock River points to no evidence of mistake or fraud to render such an inference unreasonable here.

¶12 Furthermore, Rock River gives us no reason to question whether that amount is accurate. Rock River does not point to any evidence that a *different* amount would reflect a correct purchase price for any specific goods.

¶13 Rock River next argues that the circuit court erred in its ruling that Rock River was unjustly enriched. That ruling was a conditional one in the event that its decision on the contract claim was reversed. Therefore, we need not address this issue further.

¶14 Finally, Rock River argues that the circuit court erred by awarding Menard \$500 in attorney fees for defending against Rock River’s counterclaim. In its order doing so, the court relied on “814.025(2).” It referred to this as an award of “statutory attorneys fees.”

¶15 Rock River argues that the circuit court erred because that statute was repealed in 2005. Menard suggests in response that the court simply misstated the statute number, because the award of attorney fees would have been proper under the current WIS. STAT. § 814.035(2). In reply, Rock River rejects that possibility for several reasons. However, those reasons all fail. The \$500 award for attorney fees was proper as a cost under WIS. STAT. § 814.04(1), which authorizes \$500 in “attorney fees” as an item of costs.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

